

Nos. 19-416, 19-453

IN THE
Supreme Court of the United States

NESTLÉ USA, INC.,
Petitioner,

v.

JOHN DOE I, *et al.*,
Respondents.

CARGILL, INCORPORATED,
Petitioner,

v.

JOHN DOE I, *et al.*, Individually and
on Behalf of All Proposed Class Members,
Respondents.

**On Petitions for Writs of Certiorari to the
U.S. Court of Appeals for the Ninth Circuit**

**BRIEF OF WASHINGTON LEGAL FOUNDATION
AND ALLIED EDUCATIONAL FOUNDATION
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**

Richard A. Samp
(Counsel of Record)
Marc B. Robertson
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

Date: October 28, 2019

QUESTIONS PRESENTED

1. Whether the presumption against extraterritorial application of the Alien Tort Statute, 28 U.S.C. § 1350, is displaced by allegations that a U.S. company conducts general oversight of its foreign operations at its headquarters, even though the conduct alleged to violate international law occurred in—and the plaintiffs suffered their injuries in—a foreign country, and even though the plaintiffs' alleged harms are not directly traceable to any domestic activity.

2. Whether a domestic corporation is subject to liability in a private action under the Alien Tort Statute.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
INTERESTS OF <i>AMICI CURIAE</i>	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	6
REASONS FOR GRANTING THE PETITION	9
I. REVIEW IS WARRANTED TO RESOLVE THE CONFLICT AMONG THE FEDERAL APPEALS COURTS OVER CORPORATE ATS LIABILITY ...	9
II. THE EXTRATERRITORIALITY STANDARD ADOPTED BY THE NINTH CIRCUIT CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER APPEALS COURTS	13
III. IMMEDIATE REVIEW IS WARRANTED TO END ABUSIVE ATS SUITS WHOSE PRINCIPAL GOAL IS TO ATTRACT PUBLICITY BY KEEPING LITIGATION ALIVE	16

	Page
IV. REVIEW IS WARRANTED IN LIGHT OF THE ADVERSE “PRACTICAL CONSEQUENCES” OF THE NINTH CIRCUIT’S ATS STANDARD	19
CONCLUSION	21

TABLE OF AUTHORITIES

	Page(s)
Cases:	
<i>Adhikari v. Kellogg Brown & Root, Inc.</i> , 845 F.3d 184 (5th Cir. 2017)	14
<i>Balintulo v. Ford Motor Co.</i> , 796 F.3d 160 (2d Cir. 2015)	9
<i>Doe I v. Cisco Systems, Inc.</i> , 9th Cir. No. 15-16909 (appeal docketed Sept. 24, 2015)	10, 19
<i>Doe v. Drummond</i> , 782 F.3d 576 (11th Cir. 2015)	14
<i>Doe I v. Nestlé, S.A. [“Nestlé I”]</i> , 766 F.3d 1013 (9th Cir. 2014)	3, 9, 10, 12, 20
<i>Filartiga v. Pena-Irala</i> , 630 F.2d 876 (2d Cir. 1980)	16
<i>In re Arab Bank, PLC Alien Tort Statute Litig.</i> , 822 F.3d 34 (2d Cir. 2016)(order denying reh’g) . .	9
<i>Jesner v. Arab Bank</i> , 138 S. Ct. 1386 (2018)	4, 6, 7, 10, 11, 12, 18
<i>Kiobel v. Royal Dutch Petroleum Co.</i> , 569 U.S. 108 (2013)	1, 6, 10, 13, 14, 15, 18
<i>Kiobel v. Royal Dutch Petroleum Co.</i> , 621 F.3d 111 (2d Cir. 2011), <i>aff’d</i> , 569 U.S. 108 (2013)	9
<i>Morrison v. National Australian Bank Ltd.</i> , 561 U.S. 247 (2010)	13, 14, 15
<i>Presbyterian Church of Sudan v. Talisman Energy, Inc.</i> , 582 F.3d 244 (2d Cir. 2009), <i>cert. denied</i> , 562 U.S. 946 (2010)	20
<i>RJR Nabisco, Inc. v. European Community</i> , 136 S. Ct. 2090 (2015)	14, 15, 16
<i>Sosa v. Alvarez-Machain</i> , 542 U.S. 692 (2004)	1, 6, 8, 18, 19

	Page(s)
Statutes:	
Alien Tort Statute (ATS), 28 U.S.C. § 1350	<i>passim</i>
 Miscellaneous:	
Jonathan A. Drimmer & Sarah R. Lamoree, <i>Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions</i> , 29 Berkeley J. Int’l L. 456 (2011)	16
End Slavery Now, “The ‘Chocolate Slaves’ of the Ivory Coast” (Aug. 22, 2018), available at www.endslaverynow.org/blog	17
Green America, “End Child Labor in Cocoa,” available at www.greenamerica.org	17
Sarah Grossman-Greene and Chris Byer, <i>A Brief History of Cocoa in Ghana and Côte d’Ivoire</i> (Tulane University 2009)	20
Human Rights Watch, <i>World Report 2019</i> (January 2019)	19
The No Project, “Cocoa Slavery,” available at www.thenoproject.org	18

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public-interest law firm and policy center with supporters in all 50 States.¹ WLF promotes and defends free enterprise, individual rights, a limited and accountable government, and the rule of law.

WLF has frequently appeared as *amicus curiae* in this and other federal courts to oppose litigation designed to create new and expanded private rights of action under the Alien Tort Statute (ATS), 28 U.S.C. § 1350. *See, e.g., Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). WLF also filed briefs in support Petitioners when they filed a certiorari petition in this case in 2015 and when it was before the Ninth Circuit. WLF believes that an overly expansive interpretation of the ATS threatens to undermine American foreign and domestic policy interests.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici are concerned that permitting

¹ Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than 10 days before filing this brief, *amici* notified all counsel of their intent to file. All parties have provided written consent to the filing.

unsubstantiated ATS claims of this sort to survive a motion to dismiss will impose unwarranted litigation costs on American corporations conducting business overseas. It will expose them to multi-decade litigation (this case, for example, was filed more than 14 years ago) even in the absence of factual allegations demonstrating that they engaged in conduct directed at bringing about the foreign human rights violations they routinely are alleged to have aided and abetted.

Amici are also concerned that allowing ATS suits of this sort to proceed through the discovery phase will likely harm the very groups of people that attorneys who file such suits claim to be helping. It will cause American companies to become less willing to do business in under-developed regions, thereby hindering efforts by residents of those regions to achieve economic gains.

STATEMENT OF THE CASE

Respondents are citizens of Mali who claim that they were treated inhumanely while (as children) they worked on cocoa plantations in Côte d'Ivoire (hereinafter, "Ivory Coast"). The plantations were owned by private farmers, and Respondents do not contend that Petitioners ever managed them or held any ownership interest. Nonetheless, Respondents contend that their mistreatment amounted to international human rights violations and that Respondents Nestlé USA, Inc. ("Nestlé") and Cargill, Inc.—processors and chocolate manufacturers that purchased significant quantities of cocoa grown in the Ivory Coast—aided and abetted those violations, even though the operative complaint contains no factual allegations that the

companies purchased cocoa from the plantations on which Respondents worked.

Their ATS claims, filed in July 2005, have been pending for 14 years. Throughout that period, counsel for the plaintiffs have avoided specifying precisely what they allege Nestlé and Cargill did to aid and abet human rights violations. But human rights groups have repeatedly used the lawsuit as a vehicle for criticizing Nestlé, Cargill, and other multinational corporations for not doing more to curb overseas human-rights violations by foreign citizens and governments.

The federal district court twice dismissed the complaint under Rule 12 for failure to state a cause of action. The Ninth Circuit reversed both times, but it never actually held that Respondents stated a claim under the ATS. Its September 2014 decision: (1) declined to consider whether Respondents adequately alleged facts sufficient to satisfy the *actus reus* requirements of an ATS claim, ordering that on remand Respondents be permitted to amend their complaint in light of two recent decisions from international war-crimes tribunals; and (2) rejected Nestlé’s and Cargill’s argument that dismissal should be affirmed under *Kiobel*, ruling instead that the case should be remanded to allow Respondents to amend their complaint to allege facts showing that they were not seeking extraterritorial application of federal law. *Doe I v. Nestlé, S.A.*, 766 F.3d 1013, 1026, 1027 (9th Cir. 2014) [*“Nestlé I.”*]²

² The appeals court also held that international law permits the filing of ATS claims against corporations (rejecting a

On remand, Respondents filed a Second Amended Complaint (SAC) in July 2016. The district court in March 2017 again granted a motion to dismiss the complaint, holding that Respondents were seeking extraterritorial application of the ATS. Pet. App. 63a-84a.³ In light of that ruling, the court declined to decide the *actus reus* issue or whether Respondents possessed Article III standing, although both issues had been fully briefed by the parties. *Id.* 64a.

The Ninth Circuit again reversed. Pet. App. 34a-46a. It noted this Court’s holding in *Jesner v. Arab Bank*, 138 S. Ct. 1386 (2018), that foreign corporations cannot be sued under the ATS. *Id.* at 38a. But the appeals court stated that “*Jesner* did not eliminate all corporate liability under the ATS, and we therefore continue to follow *Nestlé’s* holding as applied to domestic corporations.” *Id.* at 39a.

The Ninth Circuit also rejected Nestlé’s and Cargill’s argument that the relevant focus of the ATS (for purposes of determining whether Respondents’ claims were extraterritorial) was the location of the alleged human rights violations and the location of Respondents’ injuries—in this instance, the Ivory Coast. *Id.* at 41a. The appeals court said that the ATS’s “focus” also includes conduct that aids and abets human rights violations, and that the ATS is properly invoked when the aiding-and-abetting activity occurs within the United States. *Id.* at 42a. The court cited, as examples

conflicting decision from the Second Circuit). *Id.* at 1021.

³ “Pet. App.” refers to the Petition Appendix in No. 19-453.

of relevant domestic conduct, the SAC's allegations that unspecified defendants: (1) provided "personal spending money to maintain the farmers' and/or the cooperatives' loyalty as an exclusive supplier" of cocoa; and (2) "had employees from their United States headquarters regularly inspect operations in the Ivory Coast and report back to the United States offices, where these financing decisions ... originated." *Id.* at 43a-44a.

The Ninth Circuit conceded that the allegations of the SAC failed to specify which defendants allegedly undertook actionable conduct within the United States:

The [SAC] names several foreign corporations as defendants, and plaintiffs concede those defendants must be dismissed on remand. The [SAC] also discusses defendants as if they are a single bloc—a problematic approach that plaintiffs would be well to avoid.

Id. at 44a. The court nonetheless concluded that Respondents' failure, during the first 14 years of litigation, to allege specific domestic aiding-and-abetting conduct by Nestlé and Cargill did not justify dismissal of the claims. Instead, it ordered a remand to allow Respondents to amend their complaint to specify aiding and abetting conduct that "took place in the United States" and that is "attributable" to either Nestlé or Cargill. *Id.* at 46a.

A sharply divided appeals court denied a petition for rehearing *en banc*. Pet. App. 5a-7a. Judge Bennett (joined in whole or in part by seven other judges) filed an opinion dissenting from the denial. *Id.* at 7a-33a.

He argued that corporations are not proper ATS defendants, citing *Jesner* for the proposition that the relevant policy determination—whether to extend ATS liability to corporations—is one “for Congress and not the courts.” *Id.* at 23a. He also concluded that Respondents’ claims are impermissibly extraterritorial. *Id.* at 24a-32a.

SUMMARY OF ARGUMENT

The petitions raise issues of exceptional importance to the business community. The Court in *Sosa* made clear that courts should exercise “great caution” in recognizing new federal common-law rights of action under the ATS. *Sosa*, 542 U.S. at 728. Indeed, it indicated that there might not be *any* additional causes beyond the three common-law rights of action generally recognized at the time Congress adopted the ATS in 1789. *Id.* at 724. The Court held in *Kiobel* that relief under the ATS is unavailable for “violations of the law of nations occurring outside the United States,” because “the presumption against extraterritoriality applies to claims under the ATS” and “nothing in the statute rebuts that presumption.” *Kiobel*, 569 U.S. at 124. Citing its belief that “a decision to create a private right of action is one better left to legislative judgment in the great majority of cases” and that its reluctance to create private rights of action “extends to the question whether the courts should exercise the authority to mandate a rule that imposes liability upon artificial entities like corporations,” *Jesner* held that federal courts should not “extend ATS liability to foreign corporations.” *Jesner*, 138 S. Ct. at 1386, 1402-03.

But far from heeding *Sosa*’s, *Kiobel*’s, and

Jesner's words of caution, the Ninth Circuit has taken those decisions as license to continue with business as usual and to create an ever-expanding array of federal common law causes of action for alleged violations of the law of nations. The causes of action recognized by the Ninth Circuit panel in this case carry that trend to new heights. In the course of doing so, the appeals court has created and/or exacerbated several circuit splits that warrant this Court's immediate review.

Review is particularly warranted because, as this case illustrates, plaintiffs' attorneys are using ATS litigation not as a means of obtaining redress for injured clients but simply as a vehicle for attracting attention to favored human-rights campaigns. The targets of most ATS lawsuits are large corporations that conduct business in less-developed countries. The complaints invariably allege, as here, that the defendants have aided and abetted human-rights violations by *others*—governments and individuals within those countries. Demonstrating actual wrongdoing by the corporate defendants is usually at most an afterthought; indeed, *amici* are unaware of any federal court finding that a large corporation violated the ATS. Rather, the evident purpose is to prolong ATS lawsuits for as many years/decades as possible as a means of generating maximum publicity.

The Ninth Circuit has determined that during 14 years of litigation, Respondents have failed to plead an actionable claim under the ATS. Yet it has authorized Respondents to return to district court to try yet again—and to do so under legal standards that conflict with ATS standards adopted by other federal circuits and this Court. Nestlé and Cargill should not be

required to endure another decade a litigation—and all the damage to their brands that continued human-rights litigation entails—before obtaining resolution of the important legal questions they have raised. Immediate review is warranted.

Moreover, *Sosa* directs courts—when considering whether to exercise their federal-common-law authority to recognize a cause of action under the ATS—to take into account “the practical consequences” of doing so. 542 U.S. at 732-33. *Amici* submit that the adverse practical consequences of recognizing an aiding-and-abetting cause of action against large corporations based largely on their decisions to conduct business in underdeveloped countries are significant. In particular, impoverished nations—many of whose governments and business communities have spotty human rights records—cannot hope to improve their living standards unless they can persuade large, multi-national corporations to conduct business within those nations. Yet if corporations find themselves targeted by ATS suits whenever they enter into a contract with a foreign government or foreign business that violates human rights, they will be less likely to enter into such business transactions in the future—thereby harming the very people most likely to be victims of human rights abuses. Review is warranted to determine whether this is the sort of tort action Congress had in mind when it adopted the ATS.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED TO RESOLVE THE CONFLICT AMONG THE FEDERAL APPEALS COURTS OVER CORPORATE ATS LIABILITY

The Ninth Circuit held that it has authority and discretion in an ATS suit to impose liability on a U.S.-based corporation (such as Nestle or Cargill) without a specific direction from Congress to do so. Pet. App. 38a-39a.

Review of that holding is warranted to resolve a longstanding circuit split regarding corporate liability under the ATS. The Second Circuit has held that corporate liability “is not a rule of customary international law that we may apply under the ATS.” *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 145 (2d Cir. 2011). That court has given every indication that it plans to adhere to its holding. *See, e.g., Balintulo v. Ford Motor Co.*, 796 F.3d 160, 166 n.28 (2d Cir. 2015) (criticizing district court for failing to follow *Kiobel* and noting that the Supreme Court’s affirmance of *Kiobel* on alternate grounds did not reduce the decision’s binding authority within the Second Circuit); *In re Arab Bank, PLC Alien Tort Statute Litig.*, 822 F.3d 34 (2d Cir. 2016) (Jacobs, J., concurring in the denial of rehearing *en banc*) (explaining why reconsideration of the ATS corporate liability issue was inappropriate despite the acknowledged conflict with other appeals courts).

Nor has the Ninth Circuit given any indication that it plans to back down from its conflicting decision. The Ninth Circuit held in *Nestlé I* that both foreign and domestic corporations are subject to suit under the ATS.

766 F.3d at 1021. It adhered to that position with respect to domestic corporations even after reviewing the *Jesner* decision:

[T]he Supreme Court in *Jesner* held that foreign corporations cannot be sued under the ATS. *Jesner* thus abrogates *Nestlé I* insofar as it applies to foreign corporations. But *Jesner* did not eliminate all corporate liability under the ATS, and we therefore continue to follow *Nestlé I*'s holding as applied to domestic corporations.

Pet. App. 38a-39a.

Indeed, the Ninth Circuit is awaiting the Court's action on this certiorari petition before proceeding with yet another long-pending ATS lawsuit against a domestic corporation. *Doe I v. Cisco Systems, Inc.*, Ninth Cir. No. 15-16909, Dkt. #75 (Aug. 6, 2019) (stating that no oral argument date will be set in fully briefed ATS case until "Supreme Court proceedings in *Doe v. Nestle*, No. 17-55435, if any, have concluded").

This Court has twice granted certiorari petitions to resolve the circuit conflict over corporate ATS liability. The issue was squarely raised in *Kiobel*, but the Court ultimately affirmed the Second Circuit's judgment on alternate grounds. *Kiobel*, 569 U.S. at 124-25. In 2017, the Court granted review on the ATS corporate liability issue in *Jesner* but resolved that case without addressing whether *domestic* corporations are subject to ATS claims. It ruled more narrowly that "any imposition of corporate liability on foreign corporations

for violations of international law must be determined in the first instance by the political branches of Government.” *Jesner*, 138 S. Ct. at 1408. In the absence of such a determination from Congress, the Court ruled that courts lack authority to impose ATS liability on a foreign corporation. *Ibid.*

Although *Jesner* did not decide whether courts may impose ATS liability on domestic corporations, the three opinions comprising the Court’s majority provided significant guidance on how that issue should be resolved. The Ninth Circuit’s conclusion that domestic corporations are subject to ATS liability conflicts sharply with that guidance, a conflict that provides an additional reason to review the decision below.

Justice Kennedy’s three-justice plurality opinion stated explicitly that “[t]he international community’s conscious decision to limit the authority of international tribunals to natural persons counsels against a broad holding that there is a specific, universal, and obligatory norm of corporate liability under currently prevailing international law.” *Jesner*, 138 S. Ct. at 1401 (plurality opinion).

Justice Alito’s opinion concurring in part and concurring in the judgment stated that the ATS’s principal objective was “to avoid diplomatic friction.” 138 S. Ct. at 1410. He concluded that “[f]ederal courts should decline to create federal common law causes of action under” the ATS unless doing so would “materially advance the ATS’s objective of avoiding diplomatic strife.” *Ibid.* He foresaw no possibility that declining to create corporate liability under the ATS would “give other nations just cause for complaint against the

United States” given that “customary international law does not *require* corporate liability as a general matter.” *Ibid.* Justice Alito’s opinion strongly implies that ATS actions are unauthorized not only with respect to foreign corporations but also with respect to domestic corporations.

Justice Gorsuch’s separate opinion provides even stronger guidance against ATS corporate liability. He would have held that courts lack authority to create *any* causes of action under the ATS other than the three recognized under international common law when the ATS was enacted in 1789; those three did not include aiding-and-abetting claims of the sort now routinely raised within the Ninth Circuit against domestic corporations. 138 S. Ct. at 1412-13.

Before issuing its decision, the court below directed the parties to submit supplemental briefs on *Jesner*’s relevance. After full consideration, the Court stated that *Jesner* “did not eliminate all corporate liability under the ATS, and we therefore continue to follow *Nestlé*’s holding as applied to domestic corporations.” Pet. App. 39a. That statement confirms that no purpose would be served by delaying review of this issue to permit the Ninth Circuit to once again consider its position in light of *Jesner*. The longstanding circuit conflict over corporate ATS liability will persist unless the court grants review to resolve it now.

II. THE EXTRATERRITORIALITY STANDARD ADOPTED BY THE NINTH CIRCUIT CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER APPEALS COURTS

Review is also warranted to resolve the sharp circuit conflict regarding when application of the ATS should be deemed extraterritorial and thus barred by this Court's *Kiobel* decision.

Federal statutes are subject to a presumption against extraterritorial application; “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.” *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 255 (2007). *Kiobel* held that although the ATS is strictly a jurisdictional statute and does not directly regulate conduct or afford relief, the principles underlying the presumption against extraterritorial application “similarly constrain courts considering causes of action that may be brought under the ATS.” 569 U.S. at 116. The Court held that the ATS includes “no clear indication” that Congress intended extraterritorial application and thus that any ATS claim “seeking relief for violations of the law of nations occurring outside the United States is barred.” *Id.* at 125. Moreover, even if an ATS claimant points to some actions by the defendant with a domestic nexus, his claims are still barred unless the claims “touch and concern the territory of the United States ... with sufficient force to overcome the presumption against extraterritorial application.” *Id.* at 124-25.

The district court dismissed Respondents' claims, holding that the Second Amended Complaint sought extraterritorial application of the ATS. The Ninth

Circuit reversed, finding that Respondents had alleged “domestic conduct [that] is relevant to the ATS’s focus.” Pet. App. 44a. The Ninth Circuit pointed to two allegations in the SAC that it deemed “domestic conduct” and “relevant to the ATS’s focus”: (1) unspecified defendants provided “personal spending money to maintain the farmers’ and/or the cooperatives’ loyalty as an exclusive supplier” of cocoa; and (2) unspecified defendants “had employees from their United States headquarters regularly inspect operations in the Ivory Coast and report back to the United States offices, where these financing decisions ... originated.” *Id.* at 43a-44a.

Petitioners have explained at length why the decision below conflicts sharply with decisions of the Second, Fifth and Eleventh Circuits regarding standards for determining what constitutes domestic application of the ATS. *See* Nestlé Pet. at 15-20; Cargill Pet. at 20-25 (citing, among other decisions, *Doe v. Drummond*, 782 F.3d 576 (11th Cir. 2015); and *Adhikari v. Kellogg Brown & Root, Inc.* 845 F.3d 184 (5th Cir. 2017)). *Amici* will not repeat those explanations here.

Amici write separately to explain why the decision below also conflicts sharply with this Court’s decisions in *Kiobel*, *Morrison*, and *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2015). To determine whether Respondents’ claims involve domestic application of the ATS, *RJR Nabisco* instructs courts to look to the statute’s “focus.” “If the conduct relevant to the focus occurred in a foreign county, then the case involves an impermissible extraterritorial application regardless of any other conduct that

occurred in U.S. territory.” 136 S. Ct. at 2101.

The Ninth Circuit’s understanding of the “focus” test conflicts with the test as it is articulated in *Kiobel*, *Morrison*, and *RJR Nabisco*. The Ninth Circuit held that the “focus” of the ATS includes conduct that in any manner “aids and abets” violations of the law of nations. Pet. App. 42a. It thus concluded that claims alleging activities by Nestlé or Cargill within the United States that contributed to human rights violations by Ivory Coast farmers constitute domestic application of the ATS. *Id.* at 43a-44a.

This Court has adopted a far narrower conception of a statute’s “focus.” In *Morrison*, for example, the Court held that the “focus” of the Securities Exchange Act of 1934 was the actual purchase and sale of securities. 561 U.S. at 266. Because the securities transactions at issue in *Morrison* occurred in Australia, the Court determined that they were not subject to U.S. securities laws. *Id.* at 266-67. The Solicitor General urged the Court to define the Act’s focus far more broadly, to encompass any transnational securities fraud “when the fraud involves significant conduct in the United States that is material to the fraud’s success.” *Id.* at 270. The Court rejected that approach and thus discounted the relevance of evidence that the defendants’ misconduct originated in the United States. *Id.* at 266.

The ATS “focus[es]” on violations of international law, and all alleged international-law human-rights violations in this case (and resulting injuries) are alleged to have occurred in the Ivory Coast. Respondents allege that unspecified defendants assisted

Ivory Coast farmers in these violations from within the United States by providing funding and regularly monitoring farm activities. The Ninth Circuit’s holding that such U.S.-based financial assistance is the “focus” of the ATS sharply conflicts with *Morrison*’s conclusion that fraudulent conduct within the U.S. is not included within the “focus” of U.S. securities law—even when that conduct is “material to the success” of overseas securities fraud. Nor can that holding be reconciled with *RJR Nabisco*’s edict that “[i]f the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.” 136 S. Ct. at 2101.

III. IMMEDIATE REVIEW IS WARRANTED TO END ABUSIVE ATS SUITS WHOSE PRINCIPAL GOAL IS TO ATTRACT PUBLICITY BY KEEPING LITIGATION ALIVE

When the revival of ATS litigation began four decades ago, ATS claims typically targeted deposed foreign officials accused of torturing citizens of their own countries. *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). But for the past 20 years, most all ATS litigation has targeted large multi-national corporations. The lawsuits rarely allege that the corporate defendant violated human rights (by, *e.g.*, engaging in genocide, torture, or slavery). Rather, they typically allege that the corporate defendant aided and abetted human-rights violations committed by citizens or governments in a country in which the corporate defendant conducts business—with the alleged aid often taking the form of financial assistance to the alleged perpetrators. *See* Jonathan A. Drimmer & Sarah R.

Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 *Berkeley J. Int'l L.* 456, 460-63 (2011).

Remarkably, among the more than 150 ATS claims filed against multi-national corporations, not one (to *amici's* knowledge) has concluded with a plaintiff verdict. Many of the lawsuits languished (or continue to languish) in federal court for a decade or more, often never advancing beyond the pleadings stage. This case is typical. Nestlé and Cargill have spent 14 years contesting Respondents' claims; a third defendant, Archer-Daniels-Midland Co., entered into a settlement agreement rather than continue to face mounting litigation costs and assaults on its reputation. The court below determined that during those 14 years, Respondents have failed to plead an actionable claim under the ATS. Yet it has authorized Respondents to return to district court to try yet again.

Amici submit that permitting this case to drag on plays directly into the hands of human-rights activists who pursue ATS litigation against multi-national corporations. They have displayed remarkably little interest in pursuing this lawsuit to resolution. Rather, the apparent purpose of these lawsuits is to serve as an adjunct to human-rights campaigns being waged in the press and before legislatures. Labor conditions in third-world countries rarely meet standards mandated in Western countries. Human-rights groups have worked tirelessly to bring attention to those sub-standard conditions. *See, e.g.*, End Slavery Now, "The 'Chocolate Slaves' of the Ivory Coast" (Aug. 22, 2018), available at www.endslaverynow.org/blog; Green America, "End Child Labor in Cocoa," available at

www.greenamerica.org; The No Project, “Cocoa Slavery,” available at www.thenoproject.org. The existence of lawsuits against high-profile defendants has been a valuable resource for those public-relations campaigns.

Nestlé and Cargill should not be held hostage to those campaigns. Unless review is granted and this interminable lawsuit can be brought to an end, Respondents will have achieved their purpose—which has everything to do with keeping a favored issue in the headlines and nothing to do with the merits of their claims against Nestlé and Cargill. Immediate review is warranted; otherwise, this case can be expected to languish within the Ninth Circuit for years to come.

Other federal circuits have taken to heart the strict limitations on ATS claims imposed by *Sosa*, *Kiobel*, and *Jesner*. As *Jesner* explained, “The Court’s recent precedents cast doubt on the authority of courts to extend or create private rights of action even in the realm of domestic law, where the Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.” 138 S. Ct. at 1402. But the Ninth Circuit apparently is oblivious to those warnings. The court below yet again endorsed creation of expansive ATS causes of action against domestic corporations for overseas activity.

One can reasonably expect human-rights activists to file their future ATS lawsuits in district courts within the Ninth Circuit. By classifying Respondents’ allegations (meetings in a U.S. corporate headquarters at which payments for overseas products are approved)

as a “domestic” application of the ATS, the Ninth Circuit has assured that ATS litigation of the sort at issue here and in *Doe I v. Cisco* will continue to thrive. Meetings of that description are routine at major companies; it is difficult to imagine a large U.S.-based corporation winning dismissal on extraterritoriality grounds under the standard adopted by the court below.

In sum, review is warranted to bring an immediate end to abusive ATS litigation of the sort at issue here.

IV. REVIEW IS WARRANTED IN LIGHT OF THE ADVERSE “PRACTICAL CONSEQUENCES” OF THE NINTH CIRCUIT’S ATS STANDARD

Review is also warranted in light of the significant practical consequences of permitting ATS claims of this sort to go forward. *Sosa* instructs that federal courts, when considering whether to exercise their federal-common-law authority to recognize a cause of action under the ATS, to take into account “the practical consequences” of doing so. 542 U.S. at 732-33.

As a practical matter, multi-national corporations cannot undertake major industrial or commercial activities in an impoverished nation without the active cooperation of that nation’s government and business community. It is a regrettable but undeniable fact that the governments and large domestic employers in many such nations do not respect the human rights of their citizens. *See, e.g.*, Human Rights Watch, *World Report 2019* (January 2019) (documenting human rights abuses in more than 100 countries).

If multi-national corporations find themselves targeted by ATS suits whenever they enter into a contract with a foreign government or foreign business that violates human rights, they will be less likely to enter into such business transactions in the future—thereby harming the very people that ATS litigation is designed to help. Indeed, Talisman Energy, Inc.’s decision to abandon its oil exploration activities in South Sudan was triggered in large part by the adverse publicity it suffered while being targeted with an ATS lawsuit by activists in New York. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), *cert. denied*, 562 U.S. 946 (2010). Talisman Energy was targeted for having provided financial support to the government of Sudan during a period of civil unrest.

There are more than 900,000 cocoa farmers in the Ivory Coast, most of whom operate small family farms. Three-and-one half million people (out of a total national population of 22 million) rely on cocoa production for their livelihood. *See generally*, Sarah Grossman-Greene and Chris Byer, *A Brief History of Cocoa in Ghana and Côte d’Ivoire* (Tulane University 2009). Abuse of child labor has been a persistent problem on Ivory Coast farms for decades. The Ninth Circuit apparently believes that it has the answer to ending such abuse: multinational corporations should cease doing business with farms that engage in abusive labor practices. *Nestlé I*, 766 F.3d at 1024-26.

But it is difficult to see how boycotts of the Ivory Coast cocoa market—steps likely to decrease cocoa production and agricultural employment—could lead to improved conditions among the nation’s agricultural

workers. Nor are improved conditions likely to be achieved by authorizing expanded ATS lawsuits against multinational corporations.

CONCLUSION

The Court should grant the Petitions.

Respectfully submitted,

Richard A. Samp
(Counsel of Record)
Marc B. Robertson
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

Dated: October 28, 2019